

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of:)	
)	
TKR CABLE OF)	
NORTHERN KENTUCKY)	
)	
Petition for Revocation)	CUID KY0542
of Certification of)	
Unincorporated Boone County, Kentucky)	
to Regulate Basic Cable Service Rates)	
)	

MEMORANDUM OPINION AND ORDER

Adopted: August 2, 1996

Released: August 22, 1996

By the Chief, Cable Services Bureau:

INTRODUCTION

1. On January 11, 1996, TKR of Northern Kentucky ("TKR") filed a petition for revocation challenging the certification of the Kenton/Boone Counties CATV Board ("Cable Board"), as agent for the Fiscal Court of Boone County, to regulate rates for basic cable service and associated equipment.¹ The Cable Board filed an opposition to the petition and TKR filed a reply. TKR also filed two supplemental pleadings notifying the Commission of new facts and legal precedent that arose subsequent to the filing of its reply.

2. Section 623(a)(4) of the Communications Act of 1934, as amended, allows franchising authorities to become certified to regulate basic cable service rates of cable operators that are not subject to effective competition.² For purposes of the initial request for certification, local franchising authorities may rely on a presumption that cable operators within their jurisdiction are not subject to effective competition, unless they have actual knowledge to the contrary.³ Certification becomes effective 30 days from the date of filing unless the Commission

¹The Cable Board filed its "Certification of Franchising Authority to Regulate Basic Cable Rates and Initial Finding of Lack of Effective Competition" on December 15, 1993, which became effective on January 14, 1994.

²Communications Act of 1934 § 623(a)(4), 47 U.S.C. § 543(a)(4).

³47 C.F.R. §§ 76.906, 76.910(b)(4).

finds that the franchising authority does not meet the statutory certification requirements.⁴ Cable operators may file petitions for reconsideration of the franchising authority's certification within 30 days from the date such certification becomes effective.⁵ Rate regulation is automatically stayed pending review of a timely-filed petition for reconsideration alleging the presence of effective competition.⁶ Once the period for filing petitions for reconsideration has elapsed, cable operators may challenge a franchising authority's certification by filing a petition for revocation.⁷ Regardless of the grounds, however, the filing of a petition for revocation does not automatically trigger a stay of a franchising authority's ability to regulate basic cable rates.⁸

II. ARGUMENTS OF THE PARTIES

3. TKR's claim of effective competition is based on the competing provider test for effective competition set forth in the 1992 Cable Act and the Commission's rules. The 1992 Cable Act and the Commission's rules⁹ provide that only the rates of cable systems that are not subject to effective competition may be regulated. One basis upon which a cable system is deemed subject to effective competition is the competing provider test, where the franchise area is: 1) served by at least two unaffiliated multichannel video programming distributors ("MVPDs") each of which offers comparable programming to at least 50 percent of the households in the franchise area; and 2) the number of households subscribing to multichannel video programming other than the largest MVPD exceeds 15 percent of the households in the franchise area.¹⁰

⁴47 C.F.R. § 76.910(e). Certification becomes effective unless the Commission determines that: (1) the franchising authority will not adopt or administer rate regulations that are consistent with the Commission's regulations; (2) the franchising authority lacks the legal authority to adopt, or the personnel to administer, rate regulations; (3) procedural laws and regulations applicable to rate regulation proceedings by the franchising authority do not provide a reasonable opportunity for consideration of the views of interested parties; or (4) the cable system in question is subject to effective competition. 47 C.F.R. § 76.910(b); *see also* 47 U.S.C. § 543(a)(4).

⁵47 C.F.R. §§ 1.106, 76.911; *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order and Further Notice of Proposed Rulemaking, MM Docket No. 92-266, 8 FCC Rcd 5631, 5693 (1993) ("Rate Order").

⁶47 C.F.R. § 76.911(c).

⁷47 C.F.R. § 76.914.

⁸47 C.F.R. § 76.914(d).

⁹47 C.F.R. § 76.905(a).

¹⁰*See* 47 U.S.C. § 543(l)(1)(B); 47 C.F.R. § 76.905(b)(2)(i) and (ii).

On June 6, 1995, the United States Court of Appeals for the District of Columbia Circuit held invalid the Commission's interpretation of the competing provider effective competition test set forth in the Communications Act. *See* Communications Act of 1934 §623(l)(1)(B), 47 U.S.C. §543(l)(1)(B); 47 C.F.R. §76.905(b)(2). The Commission, in its *Rate Order*, interpreted the statute to mean that only MVPDs that offer service to at least 50 percent of the households in a franchise area under the first prong of the competing provider test can be considered

4. As background, TKR explains that on December 16, 1980, the prior franchisee, Storer Communications, was granted a franchise to serve both the incorporated and unincorporated areas of Boone County for a period of fifteen years.¹¹ The municipalities of the City of Florence, the City of Walton, and the City of Union authorized the Boone County Fiscal Court to award a cable television franchise for all areas within each city which comprise the incorporated portions of the County. According to TKR, cities have the authority to grant cable television franchises within municipal boundaries because, per statute, municipalities are given authority to control streets, roads, and public grounds in order to provide utility services.¹² By contrast, fiscal courts in Kentucky have the power to grant franchises for cable television only in unincorporated areas, since cable television systems are constructed or erected over county road systems and rights-of-way, over which fiscal courts have jurisdiction.¹³ TKR explains that the power of fiscal courts in granting cable franchises is limited to the unincorporated areas of the county because the city's exclusive authority over streets precludes county action.

5. TKR asserts that there are four distinct, separate franchise areas within Boone County: the three municipalities, and the unincorporated areas. TKR argues that a cable operator subject to rate regulation must establish a separate rate structure for each area served. Therefore, despite the apparent grant of a single franchise by the cities of Florence, Union, and Walton, and the Fiscal Court of Boone County in 1980,¹⁴ TKR asserts that the question of effective competition must be resolved separately for unincorporated Boone County, the subject of the instant proceeding, and each of the three cities.

in the aggregate MVPD subscribership count of the second prong of the test. *See Rate Order*, 8 FCC Rcd at 5664-65. The District of Columbia Circuit held that each prong of the competing provider test may be satisfied independently using separate groups of competing MVPDs. *Time Warner Entertainment Co., L.P., et al. v. FCC*, 56 F.3d 151, 189 (D.C. Cir. 1995). As a result of the *Time Warner* decision, as long as two MVPDs offer service to at least 50 percent of the households in a franchise area, the subscribership of all MVPDs, other than the largest MVPD, may be aggregated to satisfy the second prong of the competing provider test regardless of whether they offer service to at least 50 percent of the households in the franchise area.

¹¹TKR notes that the franchise was originally granted to Storer Communications of Northern Kentucky, Inc. and subsequently transferred to TKR Cable of Northern Kentucky, Inc. TKR is currently in franchise renewal negotiations with the County and with each of the individual municipalities referenced above. TKR adds that its franchise has already been renewed by the City of Walton. TKR Petition at p. 2, n.2.

¹²*See Constitution of Kentucky Municipalities* at §§ 163 and 164.

¹³*See Constitution of Kentucky Municipalities* at § 164.

¹⁴The preamble of Ordinance 450.1, which granted the original cable franchise to Storer Communications, reads as follows: "An ordinance granting a franchise to Storer Communications of Northern Kentucky, Inc., its successors or assigns, to own and operate and maintain a cable communications system in County of Boone, Kentucky setting forth conditions accompanying the grant of franchise, and providing for the regulation and use of said system." Petition at Exhibit 3.

6. The first prong of the competing providers test for effective competition requires that the franchise area be served by at least two unaffiliated MVPDs, each of which offers comparable programming to at least 50 percent of the households in the franchise area. TKR states that Bluegrass Cable Partners, Inc., d/b/a Telesat Cable TV ("Telesat") is also authorized to provide cable television service to all of unincorporated Boone County.¹⁵ TKR asserts that it directly competes with Telesat in this franchise area and that the two are unaffiliated multichannel video program distributors serving at least 50 percent of the households in unincorporated Boone County. TKR provides U.S. Census information¹⁶ which demonstrates that there are approximately 12,071 total households (i.e., occupied housing units)¹⁷ in the franchise area of unincorporated Boone County.¹⁸ With regard to the first prong of the competing provider test, TKR states that it offers service to approximately 9,678 households, or 80.2% of the franchise area, while Telesat offers service to approximately 9,319 households, or 77.2% of the franchise area. TKR submits that Telesat and itself offer comparable programming¹⁹ to their subscribers in the franchise area as each provides at least 12 channels of programming, including at least one channel of non-broadcast service programming.²⁰

¹⁵On July 2, 1985, Boone County, in Ordinance 450.3, granted a cable television franchise to Telesat Communications of Kentucky, Inc. to serve all areas of Boone County which Storer was not serving as of March 31, 1985. Telesat Communications later obtained the right to serve all of unincorporated Boone County. On June 20, 1989, Boone County approved the transfer of control of Telesat Communications' franchise to Jacor Cable, Inc. d/b/a Telesat Cable TV, Inc. On September 21, 1994, the Kenton Cable TV Board, on behalf of Boone County, approved the transfer of the franchise to Bluegrass Cable Partners.

TKR submits an overbuild penetration study to substantiate passage rates for itself and Telesat. The penetration figures for Telesat were obtained from the monthly report submitted by Telesat to the local franchising authority. Petition at Exhibit 7.

¹⁶The 1990 Census is an appropriate source of household data. See Cable Operator's Petitions for Reconsideration and Revocation of Franchising Authorities' Certifications to Regulate Basic Cable Service Rates, 9 FCC Rcd 3656 (1994) ("*Effective Competition Order*").

¹⁷"Housing units" are not the same as "households," the term used in the Cable Act and the Commission's rules. The count of "households" in the 1990 Census reflects only occupied housing units. See Bureau of the Census, U.S. Department of Commerce, 1990 Census of Population, CP-1-1B, Appendix B at B-8. "Housing Units" reflects occupied and unoccupied units.

¹⁸TKR states that the total households reported by the U.S. census for the unincorporated area is 12,071. Petition at p.6, n. 9; Exhibit 6.

¹⁹Competing MVPDs must offer comparable video programming to households in the franchise area. See 47 C.F.R. § 76.905(b)(2). As the Commission has stated previously, in order to provide "comparable" video programming, a MVPD must provide at least 12 channels of video programming, including at least one non-broadcast channel. See *Rate Order*, 8 FCC Rcd at 5667.

²⁰Petition, Exhibit 9 (showing the channel line-ups for TKR and Telesat).

7. With regard to the second prong of the competing provider test, whether more than 15 percent of the households in the franchise area subscribe to competing multichannel video programming providers, TKR states that approximately 4,119 of the 12,071 households, or 34.1%, subscribe to TKR's cable system, and approximately 4,598, or 38.1%, subscribe to Telesat's cable system. Based on this evidence, TKR argues that the second prong of the competing provider test is satisfied as more than 15 percent of the households in its franchise area subscribe to Telesat, the smaller cable operator.

8. The Cable Board opposes TKR's petition for revocation on four separate grounds. First, the Cable Board alleges that TKR does not have standing before the Commission because its franchise with Boone County expired on December 16, 1995.²¹ Without a franchise, the Cable Board argues that TKR has no legal right to file the instant petition.²²

9. Second, the Cable Board argues that the petition is not properly before the Commission because certain procedural requirements have not been met. The Cable Board argues that TKR's reliance on Section 76.914 of the Commission's regulations when filing its petition is premature as this section addresses revocations in situations where the franchise authority should be given the first opportunity to cure the defect or non-conformance. The Cable Board argues that TKR should instead have relied on Section 76.915 of the Commission's regulations for relief as that is the section which involves a change in regulatory status. The Cable Board asserts that Section 76.915 must be satisfied before asking the Commission for relief.²³

10. The Cable Board's third ground for opposition is that TKR has redefined its franchise area to such an extent that it no longer comprises all of unincorporated Boone County. Here, the Cable Board argues that while Telesat has wired rural areas of Boone County, TKR has remained near the denser population centers of unincorporated Boone County which are adjacent to larger cities and commercial zones. The Cable Board also asserts that the General Manager of TKR "informed the Cable Board's franchise renewal negotiation team that TKR does not intend to extend its cable system into rural Boone County."²⁴ The Cable Board argues that the Commission should dismiss TKR's petition and require it to demonstrate that effective competition exists within the "redefined" franchise area by submitting either a petition pursuant to Section 76.915, or a new petition for revocation to the Commission.

²¹Opposition at p. 5.

²²The Cable Board also asserts that, without the benefit of an existing franchise, the Commission should issue an order pursuant to § 76.9 to show cause as to why TKR should not be directed to cease and desist from violating the Commission's rules. *Id.* at p. 6.

²³*See* 47 C.F.R. § 76.915(a) ("A cable operator that becomes subject to effective competition, may petition the franchising authority for change in its regulatory status. The operator bears the burden of proving the existence of effective competition."); 47 C.F.R. §76.915(e) ("Cable operators denied a change in status by a franchising authority may seek review of that finding at the Commission by filing a petition for revocation.")

²⁴Opposition at p. 14.

11. The Cable Board's fourth basis of opposition is that the relevant franchise area for TKR includes all of unincorporated Boone County and the City of Florence, and that in this larger franchise area, there is no effective competition.²⁵ The Cable Board argues that TKR failed to mention the Interlocal Cooperation Act of Kentucky ("ICA")²⁶ when it asserted that only fiscal courts in the state can issue a franchise in the unincorporated areas of their respective counties. According to the Cable Board, the ICA permits cities and counties to join together for cooperative undertakings, and these joint ventures may include the award of a cable television franchise covering city and county areas. The Cable Board argues that the Fiscal Court of Boone County and the City of Florence entered into such an arrangement in 1980 when they issued a single franchise covering both the unincorporated areas of Boone County and the incorporated area of the City. The Cable Board states that since rate regulation commenced in 1993, TKR has filed single rate filings for all of Boone County, in addition to adjacent Kenton County, as a single franchise area.²⁷

12. Turning to effective competition factors, and basing its analysis on a franchise area consisting of unincorporated Boone County and the City of Florence, the Cable Board concedes that TKR and Telesat offer comparable programming and that the cable service provided by Telesat is physically and actually available in its franchise area which includes all of Boone County.²⁸ However, the Cable Board argues that the petition for revocation should be dismissed because TKR fails the first prong of the effective competition test. It explains that the total households for the combined franchise area of unincorporated Boone County (12,071 households) and the City of Florence (6,993 households) equals 19,064 households. TKR offers service to 16,671 households, or 87% of the relevant franchise area, while Telesat offers service to approximately 9,319 households, or 49% of the combined Boone County/Florence franchise area.²⁹ The Cable Board argues that since Telesat does not offer service to at least 50% of the households in the relevant franchise area, the first prong of the competing provider test is not satisfied.³⁰

13. In its reply, TKR counters each argument presented by the Cable Board. It rejects as "patently false" the Cable Board's assertion that it is currently operating without a franchise.

²⁵The Cable Board concedes that the jurisdictional areas of the Cities of Union and Walton should not be included in the relevant franchise area as they have recently issued new and separate franchises which are, with respect to the defined franchise area, limited to their respective territories. Opposition at p. 9, n.11.

²⁶KRS §§ 65.210-65.300.

²⁷The Cable Board attaches exhibits that allegedly demonstrate that TKR fails to establish a separate rate structure for each "claimed" franchise area served. Opposition at Exhibit 4.

²⁸Opposition at p. 11.

²⁹See Opposition at pp. 11-12 and n.13.

³⁰Id. at p. 12.

TKR states the Cable Board omits the fact that the two parties have formally agreed in writing that TKR will continue to provide cable service pursuant to TKR's 1980 franchise; this agreement incorporates further provisions which are detailed in a letter dated December 6, 1995.³¹ TKR states that these documents show the parties expressly agree that "TKR will continue to provide cable service in accordance with the franchise ordinances beyond the expiration dates and that the formal renewal procedures or process set forth by the Federal Cable Act will be suspended, so long as negotiations continue in good faith and reasonable progress is achieved."³²

14. With regard to the Cable Board's assertion that TKR must first file with the Cable Board for a change in regulatory status, TKR asserts that the Commission does not require that such a request be initially filed with the local franchising authority. TKR also asserts that the Cable Board has already rejected its formal request for a finding that it is subject to effective competition, as noted in the minutes of the Cable Board's meeting of June 8, 1994.³³ TKR also argues that Section 76.915 applies by its terms to situations with "changed circumstances," but that there are no changed circumstances in this case since unincorporated Boone County has qualified as a franchise area that is subject to effective competition ever since the date the Cable Board became certified to regulate rates.

15. Next, TKR disputes the Cable Board's redefined franchise area argument, stating that it is neither accurate or relevant. TKR states that its franchise for unincorporated Boone County requires it to provide service to any area of the County with a density of 35 homes per mile or less; the operator asserts that it has substantially complied with these build-out requirements throughout the term of the franchise, and will continue to do so. TKR notes that the failure to construct in an area with no homes or in areas with densities less than required by the franchise cannot be characterized as redefining the franchise area.³⁴

16. TKR objects to the Cable Board's claim that its franchise area also includes the City of Florence, arguing that Kentucky state law as well as the Communications Act and the Commission's rules recognize Florence and the Boone County Fiscal Court as separate

³¹Reply at p. 13, Exhibit G.

³²*Id.* TKR argues that even if it was not operating pursuant to the agreements set forth above, it is still operating legally, as it advised Boone County of its intention to renew its franchise pursuant to the provisions of the Cable Act. According to TKR, the Cable Board failed to take any action during the four month renewal period resulting in TKR's franchise renewing automatically.

³³Reply, Exhibit F.

³⁴TKR additionally argues that if it had limited its franchise area, then the competitive analysis would have been done on a smaller area with greater penetration, which would make a stronger case for effective competition.

franchising authorities serving different franchise areas.³⁵ TKR recognizes that while franchise areas, such as the ones at issue, can be jointly administered, they are still separate franchises; the ICA does not alter the fact that each municipality and each Fiscal Court must approve its own franchise.³⁶ TKR also points to several facts indicating that the political units in Boone County have not relinquished control over their own franchising authority: (1) an affidavit signed by the Mayor of Florence indicates that Florence is negotiating its franchise renewal separately from the Cable Board, and that its franchise area will be separate from the franchise area of unincorporated Boone County; (2) two other Boone County municipalities, the City of Union and the City of Walton, have already approved their own franchise renewals; (3) the City of Florence, in a 1993 Ordinance, indicates that the Boone County Fiscal Court in 1980 was acting on behalf of the City to award the franchise that belongs to the City; (4) this same ordinance indicates that the City of Florence is the franchising authority for the City of Florence and that the City is granting to the Cable Board the authority only to negotiate on the City's behalf for renewal of Florence's franchise; and (5) a resolution passed by the Boone County Fiscal Court on behalf of unincorporated Boone County indicates that in 1980, the Board was authorized to issue a franchise covering only unincorporated Boone County, and that the Fiscal Court is the franchising authority for unincorporated Boone County.³⁷

17. TKR also submits that there is no basis for the Cable Board's argument that it has treated Boone County as a single franchise area. While TKR admits that it submitted consolidated rate filings to cover this area, it argues that the Cable Board fails to mention that the areas are served by a single cable system,³⁸ as defined by the Commission's rules, and that TKR has always filed its rates on a system-wide basis. In the absence of any other evidence that TKR has treated the unincorporated County and the three municipalities as one franchise area, the operator asserts that the Cable Board's arguments must be dismissed.

³⁵Reply at pp. 4-8. TKR also asserts that the Board's failure to become re-authorized under Kentucky's interlocal agreement law has resulted in the Board losing its legal authority to regulate TKR's rates. TKR notes that it is the interlocal agreement law which gives the Cable Board its regulatory power, not any franchise agreement. However, in its first supplement to the reply, TKR states that the Kentucky Attorney General recently granted the Cable Board's reauthorization request. While TKR has not had an opportunity to examine the Attorney General's written opinion, it does assert that the version of the agreement originally filed by the Cable Board contained language concerning the franchising autonomy of each political unit in Boone County; for example, Section 6(f) of the agreement indicates that one of the Board's powers is "[t]o enforce any provision of any franchise any one of the Local Governments has in effect." Supplement to Reply at p. 2.

³⁶TKR also notes that the City of Florence and Boone County were assigned separate community unit identification ("CUID") numbers by the Commission.

³⁷Reply at pp. 6-8.

³⁸See 47 C.F.R. §76.5(a) ("Cable system or cable television system. A facility consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community. . . .").

18. TKR argues it is subject to effective competition because TKR and Telesat both serve the same unincorporated franchise area of Boone County, Kentucky, a fact that the Cable Board did not dispute; the Cable Board also did not dispute the facts that Telesat offers service to 77.2% of the franchise area with a 38.1% penetration rate, and TKR offers service to 80.2% of the franchise area with a 34.1% penetration rate.³⁹ TKR further submits that the Cable Board agrees that Telesat and TKR offer comparable programming.⁴⁰ TKR additionally notes that the Cable Board found that Telesat was subject to effective competition for unincorporated Boone County on March 16, 1994, and that to find TKR is not subject to effective competition would raise serious equal protection arguments under the U.S. Constitution.⁴¹

III. DISCUSSION

19. We will first address the Cable Board's procedural arguments. We reject the Cable Board's contention that TKR does not have standing to file the instant petition because its franchise has elapsed. TKR has shown that it has entered into a franchise extension agreement with the Cable Board to provide cable service pursuant to TKR's 1980 franchise while it continues to negotiate a new long-term franchise agreement. More evident, TKR's franchises have not been revoked and it is still operating its cable system in the relevant franchise areas. Given these facts, we find that TKR, as a party with standing, is permitted to file the instant petition for revocation.⁴² We also accept TKR's petition as properly filed under Section 76.914, rather than Section 76.915, of the Commission's rules. The Commission has consistently accepted petitions for revocation without the cable operator first presenting its case to the local franchising authority.⁴³ Further, TKR demonstrates that the Commission should grant the relief requested because the Cable Board already rejected its formal petition for a finding that it is subject to effective competition.⁴⁴

³⁹Reply at p. 2.

⁴⁰*Id.*

⁴¹In a pleading filed on July 2, 1996, TKR asserts that it meets the competing provider effective competition test in the combined area of unincorporated Boone County and the City of Florence, if home satellite dish and DBS providers in the franchise areas are included in the analysis. Second Supplement to Reply at p. 2.

⁴²Accordingly, we decline to issue a show cause order.

⁴³*See Florida Cablevision Management Corp., d/b/a Cablevision Industries*, 11 FCC Rcd 3186 (Cab. Serv. Bur. 1995) ("Cable Operators may file petitions for reconsideration of the franchising authority's certification within 30 days from the date such certification becomes effective. Rate regulation is automatically stayed pending review of a timely filed petition for reconsideration alleging the presence of effective competition. Once the period for filing petitions for reconsideration has elapsed, cable operators may challenge a franchising authority's certification by filing a petition for revocation."); *see supra* nn. 4-10 and accompanying text.

⁴⁴*See* 47 C.F.R. § 76.915(e) ("Cable operators denied a change in status by a franchising authority may seek review of that finding at the Commission by filing a petition for revocation.").

20. We find that TKR has not redefined its Boone County franchise area. As the Commission has ruled previously, "[t]he fact that a franchise area has not as yet been filled out by construction of a system would not by itself be taken as redefining the service area."⁴⁵ The Cable Board presents no evidence that TKR has made an affirmative decision to limit its franchise area to its current service area. In fact, TKR presents evidence that it has continued to build out its system in accordance with the density service requirements of its franchise agreement.

21. We also conclude that TKR's appropriate franchise area, for purposes of the instant petition, is unincorporated Boone County, rather than the City of Florence and unincorporated Boone County as suggested by the Cable Board.⁴⁶ Several indicia support this conclusion, the most significant of which are statements contained in the affidavit of Evelyn Kalb, the Mayor of Florence. In this document, signed under oath on March 18, 1996, Mayor Kalb states that Florence has been negotiating a franchise renewal for its incorporated territory directly with TKR, and that the City of Florence's franchise will be separate and distinct from Boone County's franchise. These statements taken from a source with personal knowledge of the present franchising situation carry great weight and point to the conclusion that unincorporated Boone County is a franchise area separate from the City of Florence. The fact that two other Boone County municipalities, the City of Union and the City of Walton, have already approved separate franchise agreements with TKR is further evidence that the political units comprising Boone County have the authority and autonomy to grant distinct franchises. The Commission's assignment of different community unit identification (CUID) numbers for each franchise area at issue here further supports this conclusion. These points make it difficult to conclude that unincorporated Boone County and the City of Florence are one franchise area.

22. The Interlocal Cooperation Act as applied in this case, and the fact that TKR submits joint rate filings for Boone County, do not contradict this outcome. Both the ICA⁴⁷ and joint rate filings (for FCC Forms 393, 1200, 1205, and 1210) are designed to produce administrative efficiency, with the former allowing local political units to conserve human

⁴⁵*Implementation of Sections of the Cable Television Consumer Protection and Competition Act*, First Order on Reconsideration, Second Report and Order, and Third Notice of Proposed Rulemaking, MM Docket No. 92-266, 9 FCC Rcd 1164, 1181 (1994); *see also*, *Valley Center Cablesystems, L.P.*, 10 FCC Rcd 11940 (Cab. Serv. Bur. 1995).

⁴⁶Since we reach this conclusion, we need not address the home satellite dish/DBS subscriber count issues for the combined area of unincorporated Boone County/City of Florence, which were raised in TKR's Second Supplement to Reply.

⁴⁷*See Purpose of Interlocal Cooperation Act*, KRS §65.220:

"It is the purpose of KRS 65.210 to 65.300 to permit local governmental units to make the most efficient use of their powers by enabling them to cooperate with other localities on a basis of mutual advantage and thereby provide services and facilities in a manner and pursuant to forms of governmental organization that will accord best with geographic, economic, population and other factors influencing the needs and development of local communities."

resources (for negotiation and regulatory purposes) and reduce task redundancy, and the latter eliminating unnecessary and duplicative filings from both cable operators and the several thousand franchising authorities in existence across the county. Moreover, it has been Commission practice to allow cable operators to file joint rate filings where one technically integrated cable system serves several separate franchise areas and the operator's rates are uniform throughout the system.⁴⁸ We do not find that either the ICA or joint rate submissions, in this particular instance, turns all of incorporated and unincorporated Boone County into one franchise area, nor do they act to bind the City of Florence with the unincorporated area of Boone County under the effective competition analysis.

23. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition.⁴⁹ The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition, as defined by Section 76.905 of the Commission's rules, is present within its franchise area.⁵⁰ In this instance, we find that TKR has met its burden.

24. The first prong of the competing provider test for effective competition requires that the franchise area be served by at least two unaffiliated MVPDs, each of which offers comparable programming to at least 50 percent of the households in the franchise area.⁵¹ The 1990 Census data submitted by TKR indicates that there are 12,071 households (i.e., occupied housing units) in unincorporated Boone County. We find that TKR offers service to 9,319 of the 12,071 total households, or 80.2% of the total. In addition, we find that Telesat offers service to 9,319 households, or 77.2% of the franchise area. Thus, TKR and Telesat each pass at least 50 percent of the households in the franchise area as required by the 1992 Cable Act.

25. With respect to programming comparability, it is undisputed that the programming of the two operators is comparable. In this regard, we note that each operator offers over 40

⁴⁸See FCC Form 393 "Instructions for Worksheets Calculating Maximum Initial Permitted Rates for Regulated Cable Services" at n.1 ("When completing this form, except where noted, you should use data from the community unit involved. However, you may use data for the system instead of the community unit if all relevant factors (including program service and equipment rates, channel line-ups and franchise fees) are identical and the local franchising authority (or, where relevant, the FCC) permits you to use such system data.") (for Benchmark rates); see also 47 C.F.R. § 924(c) ("Accounts level. Except to the extent indicated below, cable operators electing cost of service regulation or seeking adjustment due to changes in external costs shall identify investments, expenses and revenues at the franchise, system, regional, and/or company level(s) in a manner consistent with the accounting practices of the operator on April 3, 1993. However, in all events, cable operators shall identify at the franchise level their costs of franchise requirements, franchise fees, local taxes and local programming.") (for cost-of-service rates).

⁴⁹47 C.F.R. § 76.906.

⁵⁰47 C.F.R. § 76.911(b)(1).

⁵¹See *supra*, n.10.

channels with more than 30 non-broadcast channels, thus satisfying the Commission's programming comparability criteria.⁵²

26. With regard to the second prong of the competing provider effective competition test, we find the evidence shows that more than 15 percent of the households in the franchise area subscribe to the multichannel video programming provided by TKR, the smaller provider. Here, TKR has submitted sufficient proof demonstrating that Telesat serves 4,598 households, or 38.1% of unincorporated Boone County, while TKR's system serves 4,119 households, or 34.1% in the franchise area. Given that TKR has satisfied both prongs of the competing provider effective competition test, we find that TKR faces effective competition, and its petition for revocation is granted.

IV. ORDERING CLAUSES

27. Accordingly, **IT IS ORDERED** that the petition for revocation filed by TKR Cable of Northern Kentucky challenging the certification of the Kenton/Boone Counties CATV Board to regulate basic cable rates in the unincorporated Boone County, Kentucky franchise area **IS GRANTED**.

28. **IT IS FURTHER ORDERED** that the certification of the Kenton/Boone Counties CATV Board to regulate TKR of Northern Kentucky's basic cable service rates in the unincorporated Boone County, Kentucky franchise area **IS REVOKED**.

29. This action is taken pursuant to delegated authority under Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

⁵²See *Rate Order*, 8 FCC Rcd. at 5667.